Filed 8/31/15 In re C.A. CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re C.A. et al., Persons Coming Under the Juvenile Court Law.	H042017 (Santa Clara County Super. Ct. Nos. 114JD23029, 114JD23030)
SANTA CLARA COUNTY DEPARTMENT OF FAMILY AND CHILDREN'S SERVICES, Plaintiff and Respondent, v. R. A., Defendant and Appellant.	

On December 23, 2014, the Santa Clara County Department of Family and Children's Services (Department) filed two separate petitions involving 15-year-old C.A. and then-11-year-old S.A. (collectively, the minors), under Welfare and Institutions Code section 300. (Further statutory references are to the Welfare and Institutions Code unless otherwise stated.) T.B. (Mother) and R.A. (Father) are the biological parents of the minors. The Department alleged that Mother and Father had failed to protect C.A., and that his younger sister, S.A., had been abused or neglected such that there was a substantial risk that C.A. would be abused or neglected. (§ 300, subds. (b), (j).) The

Department alleged (1) S.A. had suffered, or there was a substantial risk that she would suffer, serious physical harm nonaccidentally inflicted; (2) Mother and Father had failed to protect her; and (3) S.A. had been, or there was a substantial risk that she would be, sexually abused by a member of her household. (§ 300, subds. (a), (b), (d).) The proceedings arose out of allegations that S.A. had been beaten with a belt and had been sexually molested by M.B., her stepfather and Mother's husband (Stepfather), who resided in the home. C.A. was not detained, but S.A. was detained and placed in a foster home. At the jurisdictional/dispositional hearing on January 16, 2015, the court sustained the allegations of the petitions, placed S.A. under the care of the Department in a foster home, and ordered reunification services and visitation for Mother and Father.

On appeal, Father contends the juvenile court erred by failing to properly consider him, the noncustodial parent, for S.A.'s placement under section 361.2, subdivision (a) (hereafter, section 361.2(a)). We conclude Father forfeited this claim by failing to request such placement during the juvenile court proceedings. Accordingly, we will affirm the jurisdictional/dispositional order.

FACTS AND PROCEDURAL HISTORY

I. Initial December 2014 Petitions and Detention Hearing

On December 23, 2014, the Department filed separate petitions concerning C.A. and S.A., alleging, among other things, that Mountain View police had placed the minors in protective custody after Mother and Stepfather were arrested for physically abusing S.A. During the week of December 8, 2014, Mother and Stepfather struck S.A. on the legs with a belt, leaving multiple marks on her. Stepfather had a practice of striking S.A. at least weekly as punishment for perceived omissions in her schoolwork and for failing to complete her chores. Mother was aware of Stepfather's excessive and inappropriate physical abuse of S.A., but she had taken no steps to protect her daughter from the abuse. Additionally, for the past one and one-half years, Stepfather had, on occasions when Mother was away from home, touched S.A. inappropriately by fondling her breasts and

buttocks over her clothes. S.A. had expressed concern that this molestation would continue and increase in frequency. Mother disbelieved S.A.'s claims. The whereabouts of Father were unknown, and the minors had reported no contact with him for one year. Neither child wanted contact with him.

C.A. was not detained; the Department recommended he remain in Mother's care and custody. S.A. was detained; the Department recommended her removal from Mother's care and custody.[1]

On December 24, 2014, the court found that a prima facie showing had been made that the minors came within section 300. It ordered that (1) C.A. be released to the custody of Mother on condition she cooperate with the home supervision program; (2) S.A. be detained and removed from the physical custody of Mother and Stepfather; (3) Mother be permitted supervised visitation of S.A. a minimum of two hours, twice weekly; and (4) Stepfather be denied visitation of S.A. On January 8, 2015, the court issued a temporary restraining order preventing Stepfather from contacting S.A.

II. January 2015 Jurisdiction/Disposition Reports

A. Jurisdiction/Disposition Reports

In its January 8, 2015 jurisdictional/dispositional report, the Department reiterated the circumstances that led to the filing of the petitions and provided further detail regarding those allegations.

[1] On January 8, 2015, the Department amended the petitions to reflect a deletion of the allegation of a history of domestic violence between Mother and Father. The Department also modified the allegations concerning Mother's response to the claim that Stepfather had sexually abused S.A. It indicated in the amended petition that Mother questioned the occurrence of sexual abuse, and that she was unaware of the claimed abuse until the dependency case arose.

1. Physical Abuse Allegations

The Department reported that a referent had advised that S.A. had sustained leg injuries as a result of being struck with a belt. On December 19, 2014, a school district nurse examined S.A., confirmed that her injuries were consistent with having been struck by a belt, and contacted the police.

S.A. met separately with several officers from the Mountain View Police Department on December 19 and 20. Officers Sula and McPherson observed bruising and swelling on S.A.'s upper right thigh and small bruises on the back of her left thigh. S.A. initially told Officer Sula she had fallen on the blacktop at school. Later, crying, S.A. told Officer McPherson that the previous week, Stepfather had struck her with a belt. S.A. said that after Stepfather reviewed her notes from school and found she had not completed notes for two classes, he struck her on the legs repeatedly. Mother was in the home cooking dinner at the time.

S.A. met with Detective Jessica Nanez on December 20. She repeated what she had told the other officers and provided additional detail. S.A. explained that Stepfather required her to take one full page of notes for each class daily. Earlier the prior week after Mother and Stepfather came home from work, Stepfather called S.A. into the bedroom to review her notebook. S.A. told the officer she had forgotten to take notes for one or two classes, and Stepfather noticed the notes were missing. Stepfather became upset, made S.A. face the wall, and began striking her on the thighs and buttocks with a belt. She estimated he struck her 10 times. S.A. said that on a scale of one to ten (with ten being the worst), Stepfather struck her with a force of eight when she did not answer his questions, and at a force of four or five when she did answer him. She rated the overall pain as a " 'Nine.' " After Stepfather stopped striking her, Mother came into the room and told S.A. that she needed to take daily notes for her classes.

S.A. told Detective Nanez that Stepfather had begun striking her when she was in the fourth grade and he first struck her with a belt when she was in the fifth grade. (She

was in the sixth grade at the time of the interview.) She estimated that Stepfather struck her with a belt once a week and said the blows had become more forceful over time. In subsequent interviews with a social worker from the Department, S.A. reiterated her account of the December 2014 incident in which Stepfather struck her repeatedly with a belt. She also reiterated that Stepfather had frequently struck her on prior occasions.

On December 19, Mother told Detective Nanez that she and Stepfather had high expectations for S.A. in school. They expected her to take daily notes and S.A. understood she would receive a beating with a belt if her notes were deficient. Mother said the previous week she had called S.A. into the room where the rest of the family was present. She said C.A. was responsible for telling Mother and Stepfather whether S.A.'s notes were sufficient. Mother said that because S.A.'s notes were dirty and insufficient, Stepfather struck her once across the buttock and thigh with a belt. Mother then took the belt and struck S.A. four more times. Mother said this incident was the only time she and Stepfather had struck S.A. Detective Nanez reported that Mother "was very bothered that the police would investigate a child being hit with a belt since she believed it was a proper form of discipline."

Stepfather—after initially denying having physically disciplined S.A.—told Officer Garcia on December 19 that he had struck her one time with a belt the previous week because she had received a bad grade.

C.A. told Detective Nanez that, in the previous week while he was in his room doing homework, he had heard his sister being physically disciplined. Stepfather had called C.A. into the room to review S.A.'s class notes. C.A. said that each time he told Stepfather the notes were insufficient, Stepfather struck S.A. with a belt. C.A. said his sister "was hit all the time by [Stepfather] for not taking proper notes." C.A. told Detective Nanez that Stepfather did not strike him with a belt.

2. Sexual Abuse Allegations

In the course of Officer McPherson's December 19 interview, S.A. also reported that Stepfather had touched her chest and buttocks outside of her clothing. S.A. said Stepfather "had been 'touching' her since he and [Mother] married, approximately 2 years ago."

Detective Nanez asked S.A. on December 20 to describe Stepfather's touching that she had mentioned to Officer McPherson. S.A. said Stepfather in the past—at times when Mother and C.A. were away from the home—had touched, or had tried to touch, her chest, buttocks, and upper thighs. S.A. recalled an instance in early December 2014 when she was folding clothes in her room. Stepfather came into the room and tried to reach from behind and touch her breast with his hand while she was facing away from him. S.A. used her elbow to push him away; only a small portion of his hand made contact with her breast because she pushed him away. S.A. also described an incident when she had nearly completed the fifth-grade. While Mother and C.A. were out shopping, Stepfather walked behind S.A. and placed a hand on her buttock. After she moved away, he told her not to tell anyone. She estimated Stepfather had touched her inappropriately, or had tried to touch her inappropriately, approximately 30 times. And she said she was afraid of him. She told Detective Nanez that before speaking with the police, she had not told anyone about Stepfather's inappropriate touching.

In subsequent interviews by the social worker, Sarah Hogan, S.A. reiterated that Stepfather had tried to touch her breast while she was folding clothes. She reported that he had "rubbed her breasts and buttocks 'a lot of times' over the last year or two." The incidents occurred when Mother and C.A. were not home. She also told Hogan that she was afraid the inappropriate touching would become more frequent. S.A. said she had never told anyone about the touching because she was afraid no one would believe her. S.A. also told Hogan that, while she would like to come home, she was fearful of Stepfather and concerned that he would attempt to enter the home if she were there.

In response to Detective Nanez's telling Mother on December 19 that S.A. had disclosed that Stepfather had inappropriately touched her, Mother said she "would not accept the allegation. [Mother] said she would have to have a conversation with [S.A.] before she even considered believing her." Mother "insisted she had done nothing wrong and did not believe [Stepfather] touched [S.A.] inappropriately."

Mother was subsequently interviewed twice by Social Worker Hogan. Mother said S.A. was rebellious and lazy and had been telling lies over the past one and one-half months. She contended S.A. had "made these allegations against [Stepfather] because she was influenced by her biological father, who [had] been trying to defame the step-father for years." Mother said Stepfather could not possibly have touched her daughter inappropriately without Mother having witnessed it because S.A. was never alone with Stepfather.

In his December 19 interview with Officer Garcia, Stepfather denied ever having molested S.A. He told the officer there had never been a time in the past five years he had been alone with S.A.

3. Prior Family Court Proceedings

The Department reported on family court proceedings commencing in 2008 that involved Mother, Father, and the minors. The family court issued a restraining order in February 2008 to protect Mother and the minors from Father. The order was based upon Mother's declaration indicating that Father (1) was completely controlling in their relationship; (2) had choked Mother during an argument that occurred in or about 2002; (3) had, according to Mother's older son, D.R.F., kicked him, causing a bruise on his leg; (4) had tried to rape Mother in August 2007 after she refused to have sex with him; and (5) was physically and emotionally abusive to the minors. In December 2008, the family court entered an order based upon the parties' mediated agreement in which Mother and Father were awarded joint legal custody of the minors and Mother was granted sole physical custody, with visitation granted to Father.

In December 2010, the family court, based upon a family screening, issued an order awarding Mother temporary sole legal and physical custody of the minors. Pursuant to the order, Father would receive supervised visitation until he completed a parenting without violence class. He was thereafter required to attend a conflict and accountability class. The court also ordered Father to participate in a psychiatric examination, specifically to assess "any mental health issues that may negatively impact [his] parenting capacity." The court ordered Father to follow any recommendations made by the examining psychiatrist.

In August 2012, the family court, after a hearing, issued a second restraining order to protect Mother from Father. The restraining order expired in September 2012 and was not renewed.

In January 2013, the family court entered an order pursuant to the stipulation of the parties granting Mother sole legal and physical custody of the minors. Father was offered therapeutic supervised visitation with the minors twice monthly. The purpose of the therapy was to rehabilitate Father's relationship with the minors, improve his insight, and improve his parenting skills. Father was also ordered to participate in psychotherapy on a weekly basis for a minimum of six months to "address [F]ather's concerns regarding the health, safety, and well-being of the [minors], to decrease rigidity and inflexibility in his interactions with [them] and with others, to address [F]ather's obsession with [M]other and her relationship with [Stepfather], to improve cooperation and communication with [Mother], to learn negotiating and conflict resolution skills, and to learn problem-solving skills as an alternative to power-struggles."

4. Criminal History

As a result of the allegations relating to S.A., Mother was arrested and booked in the Santa Clara County Main Jail on December 19, 2014, on charges of corporal punishment on a child (Pen. Code, § 273d, subd. (a)). Apart from this arrest, Mother had no criminal history. Father had no criminal history.

5. Contacts with Father

Social Worker Hogan interviewed the minors on several occasions. C.A. said he had not seen Father for more than a year. He told Hogan he did not like Father, did not want contact with him, and did not want to live with him. C.A. explained: " '[H]e never wants me to grow up. He used to yell at me.' " C.A. also told Hogan that Father in the past had "made him feel younger than he was, by trying to get him placed in school classes for developmentally disabled children." On the two occasions Hogan asked C.A. about his feelings concerning supervised visitation or other contact with Father, C.A. said he did not want any contact or visits with Father.

S.A. likewise told Hogan she had not seen Father in more than one year. She told Hogan, " '[H]e treats me like a little kid.' " On the three occasions when Hogan asked S.A. whether she wanted to have contact with Father, she responded she did not want to see or talk with him. In response to Hogan's third inquiry, S.A. said if she were to receive a letter from Father, she would likely not read it.

On December 29, 2014, Father indicated to Hogan that he had not seen the minors or had any contact with them since May 2013. He explained he had wanted more natural visits, rather than supervised ones that had been previously ordered by the court. He denied there had ever been any domestic violence in his relationship with Mother.

6. Assessment/Recommendations

The Department indicated in its report that S.A. was at risk for further harm because of Mother's continued denial of (1) Stepfather's ongoing corporal punishment of S.A., and (2) Stepfather's molestation of, or even the possibility of his having been inappropriate with, S.A. It indicated further that Mother did not appear to prioritize S.A.'s physical and emotional well-being.

In assessing the role of Father, the Department noted he had "not had a relationship with either child for years, and further, he ha[d] not had contact with the [minors] for over a year and [a] half." Social Worker Hogan stated, "[the minors]

repeatedly express not feeling comfortable with any form of contact with [F]ather, including contact via letters. [S.A.] reports that she does not want to reside or be placed with [F]ather." Under the heading "Consideration of Placement With Non-Custodial Parent" (original emphasis and underscoring omitted), the Department repeated that the minors had expressed they wanted no contact with Father, and S.A. indicated she did not want to live with him.

The Department recommended C.A. remain in Mother's custody and that Mother participate in family maintenance services. It recommended Father receive supervised visitation with C.A. at least once a month. The Department also recommended that S.A. be removed from the home and that Mother and Father receive family reunification services. And it recommended that Mother receive supervised visitation of S.A. at least twice a week. The Department requested the court make a finding based upon clear and convincing evidence that placement with the previously noncustodial parent would be detrimental to S.A.'s safety, protection, or physical or emotional well-being.

In addition, the Department recommended that Father receive supervised visitation with S.A. at least twice a month. It indicated that such visitation was appropriate "to assist with the transition of beginning contact again, as well as to assist [F]ather in how to communicate with and rebuild his relationship with his daughter." In that regard, the Department recommended that Father attend a preteen and teen parenting class.

B. Addendum Report

In the Department's January 15, 2015 addendum report, Social Worker Hogan indicated that she had conducted a further assessment of the appropriateness of S.A.'s returning to the home if Stepfather were to move out. Hogan reported on unsupervised visits that had occurred that month between S.A., Mother, and C.A. Hogan also reported on her home visit with Mother and Stepfather. Stepfather had told Hogan that he still lived in the home but would move out if ordered by the court to do so. He also assured Hogan that in the future he, Mother, and the minors would live together again as a family.

Hogan opined that Mother's focus continued to be that of defending Stepfather and the closeness of her family, and that Mother did not appear to value the physical safety of her daughter. Hogan reiterated her recommendation that S.A. not be returned to the home. Hogan recommended that supervised visitation and contact with Mother be reinstated, and that the following two requirements be added to the case plan: (1) that Mother participate in a sexual abuse survivor's nonoffending caregiver group, and (2) that a therapist with expertise in child physical and sexual abuse trauma be selected.

III. January 2015 Jurisdictional/Dispositional Hearings

A jurisdictional and dispositional hearing took place on January 16, 2015. The court sustained the allegations of the petitions and found it had jurisdiction over C.A. pursuant to section 300, subdivisions (b) and (j), and that it had jurisdiction over S.A. pursuant to section 300, subdivisions (b), and (d).

In the proceedings involving C.A., the court ordered that he remain in the family home; that C.A. and Mother receive family maintenance services; that C.A. receive reasonable, weekly, supervised sibling visitation with S.A.; and that Father receive supervised visitation with C.A. of a minimum of once per month for one hour per visit.

In the proceeding involving S.A., the court found by clear and convincing evidence that (1) there would be substantial danger to S.A.'s physical health, safety, protection, or physical or emotional well-being if she were returned home; (2) S.A. had been sexually abused by a member of her household and there were no reasonable means by which she could be protected from further sexual abuse without removing her from the home; and (3) placement of S.A. with the noncustodial parent would be detrimental to her safety, protection, or physical or emotional well-being. The court ordered S.A. to be placed in a foster home under the care of the Department. It ordered further that Mother, Father, and S.A. receive reunification services; that Mother receive supervised visitation of S.A. a minimum of twice a week, two hours per visit; that Father receive supervised

visitation of S.A. a minimum of twice per month, one hour per visit; and that Stepfather have no contact or communication with S.A.

Father filed a timely notice of appeal. An order from a jurisdictional/dispositional hearing is one from which an appeal lies. (§ 395; *In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1150.)

DISCUSSION

I. Applicable Law

A. General Dependency Principles

Section 300 et seq. provides "a comprehensive statutory scheme establishing procedures for the juvenile court to follow when and after a child is removed from the home for the child's welfare. [Citations.]" (*In re Celine R.* (2003) 31 Cal.4th 45, 52.) As our high court has explained: "The objective of the dependency scheme is to protect abused or neglected children and those at substantial risk thereof and to provide permanent, stable homes if those children cannot be returned home within a prescribed period of time. [Citations.] Although a parent's interest in the care, custody and companionship of a child is a liberty interest that may not be interfered with in the absence of a compelling state interest, the welfare of a child is a compelling state interest that a state has not only a right, but a duty, to protect. [Citations.] The Legislature has declared that California has an interest in providing stable, permanent homes for children who have been removed from parental custody and for whom reunification efforts with their parents have been unsuccessful. [Citations.] This interest is a compelling one. [Citation.]" (*In re Marilyn H.* (1993) 5 Cal.4th 295, 307.)

The court at the jurisdictional hearing must first determine whether the child, by a preponderance of the evidence, is a person described under section 300 as coming within the court's jurisdiction. (§ 355, subd. (a).) Once such a finding has been made, the court, at a dispositional hearing, must hear evidence to decide the child's disposition, i.e., whether he or she will remain in, or be removed from, the home, and the nature and

extent of any limitations that will be placed upon the parents' control over the child, including educational or developmental decisions. (§ 361, subd. (a).) If at the dispositional hearing the court determines that removal of the child from the custody of the parent or guardian is appropriate, such removal order must be based upon clear and convincing evidence establishing that one of five statutory circumstances exists. (§ 361, subd. (c).) One such circumstance is the existence of substantial danger to the dependent child's "physical health, safety, protection, or physical or emotional well-being" if he or she is returned to the home. (§ 361, subd. (c)(1).) Another is where "[t]he minor . . . has been sexually abused, or is deemed to be at substantial risk of being sexually abused, by a parent, guardian, or member of his or her household, . . . and there are no reasonable means by which the minor can be protected from further sexual abuse or a substantial risk of sexual abuse without removing the minor from his or her parent . . ." (§ 361, subd. (c)(4).)

Section 361.2(a) [2] requires the juvenile court to place a dependent child with a previously noncustodial parent who requests custody, unless the placement would be detrimental to the child's safety, protection, or physical or emotional well-being. If the court denies placement under subdivision (a) of section 361.2, it must place its finding on the record. (§ 361.2, subd. (c) (hereafter, § 361.2(c).) Because the noncustodial parent has a constitutionally protected interest in custody, case law requires clear and convincing evidence of detriment to the child before the court can deny the noncustodial parent's request for custody. (*In re Marquis D.* (1995) 38 Cal.App.4th 1813, 1828.) With its

---

[2] "When a court orders removal of a child pursuant to Section 361, the court shall first determine whether there is a parent of the child, with whom the child was not residing at the time that the events or conditions arose that brought the child within the provisions of Section 300, who desires to assume custody of the child. If that parent requests custody, the court shall place the child with the parent unless it finds that placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child. . . ." (§ 361.2(a).)

heightened standard of proof, this provision effectuates the legislative preference for placement with the previously noncustodial parent. (*In re Austin P.* (2004) 118 Cal.App.4th 1124, 1132.)

II. No Error in Denial of S.A.'s Placement With Father

Father argues the juvenile court erred under section 361.2(a) by failing to consider him as a noncustodial parent for S.A.'s placement. He asserts the court's failure to consider him for the minor's placement, coupled with its failure to make express findings under section 361.2(c), requires that the dispositional order be reversed. He contends further that even if we were to conclude the court made the required findings, the conclusion that placement with him would be detrimental to S.A. was not supported by substantial evidence. We conclude that none of these contentions has merit.

Under section 361.2(a), where the court orders removal of the child under section 361, it must ascertain whether there is a noncustodial parent "who desires to assume custody of the child" and "*[i]f that parent requests custody*," it must place the child with him or her unless doing so would be detrimental to the child. (Italics added.) Thus, the statute makes clear that the juvenile court's duty to consider the child's placement with the noncustodial parent is triggered by the specific request of that parent. (*In re A.A.* (2012) 203 Cal.App.4th 597, 605.) If "the noncustodial parent makes no such request, the statute is not applicable. [Citations.]" (*Ibid.*) Furthermore, such failure of the noncustodial parent to request placement constitutes a forfeiture of any challenge on appeal to any noncompliance with section 361.2. (*In re A.A.*, at pp. 605-606; *In re John M.* (2013) 217 Cal.App.4th 410, 420.)

Conceding that "neither Father nor his counsel formally requested placement of S.A.," Father argues that his expression of a desire to have contact with the minors was sufficient to constitute a request for placement triggering section 361.2. We disagree.

Nothing in the record supports Father's assertion that, as a noncustodial parent, he requested placement of S.A. with him under section 361.2(a). Before the

jurisdictional/dispositional hearing, Father communicated to the Department that he was concerned about the minors' safety and well-being. He expressed "his desire to reunify with the children." Social Worker Hogan reported on December 29 that Father thought "[M]other need[ed] professional help, and that [Father] want[ed] the children to be returned to his care."

At the hearing, neither Father nor his counsel expressed a desire to be considered for S.A.'s placement. Father's counsel indicated that his client had agreed to submit the matter on the allegations of the petitions, as amended, and counsel submitted a waiver of trial rights signed by Father. Included in the waiver was the following understanding, initialed by Father: "I understand that if I plead no contest or submit the petition on the report, the court will probably find that the petition is true." The court then confirmed that Father had knowingly, intelligently, and voluntarily waived a trial on the question of jurisdiction.

On the question of the disposition recommended by the Department in the petitions, Father's counsel advised the court: "I did go over the disposition plan with [Father]. While he would like to visit with his children more, we had some discussions about what the children's wishes were at this point. So, we are prepared to submit to the current visitation order, although it is [Father's] hope that the visits will increase some time in the near future. [¶ Father] does have some concerns in general about [C.A.] being in the home, but at this point he's prepared to go with the social worker's recommendations. He's very concerned about [S.A.'s] safety and state of mind and wants the Department to ensure before [S.A.] is returned home that [Stepfather] is not in the home." Father's counsel went on to state that Father was concerned about the safety of both minors; wanted to get started with his case plan; and would like visitation set at once per week (instead of, as recommended by the Department, once a month for C.A. and twice a month for S.A.). After further argument of the parties' counsel, Father himself

addressed the court. He, like his attorney, did not request that he be considered for S.A.'s placement.

The court then announced its decision in which it adopted the recommendations of the Department. The court indicated it was "making some visitation orders. There hasn't been a visit [by Father] since . . . May of last year [*sic*].[3] So we do need to start slow. [The court needs] to start where the children are and arrange visitation in a way that they will feel comfortable and give the relationship with [Father] a chance to heal. Forcing at this point is not going to make it heal, but if we start slowly, we can allow for that."

Father, represented by counsel, submitted to jurisdiction on the Department's report and made no mention when arguing disposition that he wished to be considered for S.A.'s placement. Thus, in the face of the Department's recommendations that S.A. be placed with a foster family, and that the court find that her placement with the noncustodial parent would be detrimental to her, Father's failure to request placement rendered section 361.2(a) inapplicable (*In re A.A.*, *supra*, 203 Cal.App.4th at p. 605), and Father forfeited any challenge on appeal based upon any alleged noncompliance with that section. (*Id.* at pp. 605-606; *In re John M.*, *supra*, 217 Cal.App.4th at p. 420.)

Father relies on *In re Abram L.* (2013) 219 Cal.App.4th 452 to urge that we nonetheless consider his argument that the court erred under section 361.2(a). In that case, the agency filed a dependency petition involving two children who were living with their mother and stepfather, based upon allegations that the mother had threatened the children with physical harm. (*Id.* at p. 455.) On the date the petition was filed, the father, through counsel, stated he could not take custody of his sons because he did not yet have appropriate housing. (*Id.* at p. 457.) Approximately one month later, he told the agency he wanted to become caretaker for his sons; he did not have space for them where he was

---

[3] As acknowledged by Father, his last visit with the minors was actually in May 2013, not May 2014.

living; and he was saving money to rent a two-bedroom apartment so he could house his sons. (*Ibid.*) One month later—and 20 days before the hearing on the petition—the father notified the agency that he had found suitable housing, but declined to allow an inspection of the home, saying he was in the process of moving. (*Id.* at p. 458.) The boys told the agency several times they did not want to live with their father if his girlfriend continued to live with him. (*Ibid.*) At the jurisdictional/dispositional hearing, the agency stated it would be " 'premature' " to consider the boys' placement with their father because his home had not yet been assessed. (*Id.* at pp. 458-459.) The father's attorney (1) requested that the boys be placed with their father; (2) advised that the father's girlfriend was not living with him; (3) argued that the boys' dislike of their father's girlfriend was insufficient to deny his custody request; and (4) "concluded by stating '[t]he Department has not met its burden by clear and convincing evidence to prove that return [of the children] to the father at this time would create a substantial risk of detriment.' " (*Id.* at p. 459.) The juvenile court denied placement of the children with the father, agreeing with the agency that such placement "was 'premature.' " (*Ibid.*) The court neither cited to, nor made a finding under, section 361.2. (*In re Abram L.*, at p. 459.)

The appellate court reversed, concluding the juvenile court had erred in failing to apply section 361.2 and that this error was prejudicial. (*In re Abram L.*, *supra*, 219 Cal.App.4th at pp. 460-465.) In so holding, the court rejected the agency's argument that the father had forfeited his appellate challenge "that the juvenile court failed to apply or comply with section 361.2 because he did not raise the issue below." (*Id.* at p. 462.) The court held that, in any event, the father's trial counsel had "argued that the Department did not meet its showing that placing the children in father's custody 'would create a substantial risk of detriment.' This argument appears to be based on section 361.2, subdivision (a)." (*Ibid.*)

Here, unlike in *In re Abram L.*, neither Father nor his counsel made a request that Father be considered for placement of the minors. And here, Father's counsel made no argument whatsoever regarding the minors' placement with Father, let alone arguing the Department had not met its burden of showing that such placement " 'would create a substantial risk of detriment' " (*In re Abram L.*, *supra*, 219 Cal.App.4th at p. 462), or words to that effect. We conclude *In re Abram L.* does not support Father's contention that he did not forfeit his appellate challenge that the juvenile court erred under section 361.2, subdivision (a).

Moreover, we do not agree with Father's claim that we should overlook his forfeiture of the claim because we "may still determine the application of section 361.2 as a matter of law. [Citation.]" In support of this argument, Father cites *In re Jonathan P.* (2014) 226 Cal.App.4th 1240, a case that is factually and procedurally distinguishable. There, the whereabouts of the noncustodial father were unknown at the time of the jurisdictional/dispositional hearing and the court therefore did not order reunification services for him. (*Id.* at p. 1245.) Approximately six months later, the father appeared at a review hearing and made an oral request for custody of his child based upon a prior custody arrangement. (*Id.* at p. 1247.) At the suggestion of the agency and the court, the father thereafter filed a petition under section 388 seeking a change of the prior order denying him reunification services; he sought custody of the child (once the child was located, as the child had left his placement) and family maintenance services, or, alternatively, reunification services. (*Id.* at p. 1248.) The court denied the petition without prejudice, concluding it could not order reunification relating to a child over which the court had no custody (due to his whereabouts being unknown). (*Id.* at p. 1250.)

On appeal, the father argued the court erred in failing to consider his custody request under section 361.2 instead of under section 388. (*In re Jonathan P.*, *supra*, 226 Cal.App.4th at p. 1251.) The appellate court rejected the agency's contention that the

father's argument should not be considered because it was forfeited. (*Id.* at p. 1252.) It concluded the issue of whether section 361.2 applied under the circumstances before it—where a noncustodial parent made a request for custody *after* the dispositional hearing—was a question of law. (*Id.* at pp. 1252-1253.) Here, no such pure question of law is presented. To the contrary, were we to consider Father's appellate challenge, we would necessarily be determining from a bare record whether evidence supported a finding that placement with Father would be detrimental to S.A. Because the question of placement under section 361.2 was never triggered by a request from Father, the parties created no factual record regarding the potential placement of S.A. with Father. We therefore conclude that section 361.2, subdivision (a) is inapplicable, Father forfeited any appellate challenge, and the authorities upon which he relies in support of considering his claim are inapposite.[4]

DISPOSITION

The January 16, 2015 jurisdictional/dispositional orders are affirmed.

---

[4] We acknowledge that, based upon proposed findings submitted by the Department, the juvenile court found by clear and convincing evidence that placement with the previously noncustodial parent would be detrimental to S.A. Given the absence of Father's request for placement or citation to section 361.2, we deem these findings to be surplusage, since section 361.2 was never triggered. But even were we to address this finding, we would conclude, based upon the minimal factual record, that substantial evidence supported it. Father presented no evidence of his current living arrangements, such as where he lived (i.e., whether S.A. would be displaced from Santa Clara County), or whether his home could physically accommodate S.A. Additionally—in the face of evidence from the earlier family law proceeding mandating Father's completion of certain tasks related to his parenting—Father presented no evidence that he completed required parenting classes; submitted to a psychological examination; received psychotherapy for a minimum of six months; or participated in semimonthly therapeutic visitation with the minors in 2013. And, at the time of the hearing in January 2015, Father had had no contact with the minors in 20 months, and S.A. had repeatedly told Social Worker Hogan that she did not desire to have any contact with him.

Márquez, J.

WE CONCUR:

Rushing, P. J.

Grover, J.